No. 92-1757

Supreme Court, U.S.
FILED
MAY 27 1993

In The

# Supreme Court of the United States

October Term, 1992

ROSS MIDDLEMIST, WAYNE W. MAUGHAN, FLATHEAD JOINT BOARD OF CONTROL,

*Petitioners,*

vs.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Bruce Babbitt; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, Stanley M. Speaks; SUPERINTENDENT OF THE BIA, FLATHEAD AGENCY, Ernest Moran, in their capacities; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Michael Pablo, Chairman, Sonny Morigeau, Secretary Treasurer, Joseph Felsman, Louis Adams, Hank Baylor, Tony Incashola, John Lozeau, Lloyd Irvine, Patrick Lefthand, Laurence Kenmille; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Rhonda R. Swaney; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. Lloyd Jackson; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Joseph Schneider, Gem Mercer, Al Hewankorn, Donald Lucas, Thurman Trosper, and Henry Normandeau,

*Respondents.*

**On Petition For Writ Of Certioari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF FOR TRIBAL RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether a petition for certiorari pursuant to Supreme Court Rule 11 should be denied because Petitioners chose not to exhaust Tribal remedies, in contradiction to this Court's express rule to the contrary expressed in *National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. 845 (1985).

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SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Bruce Babbitt; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, Stanley M. Speaks; SUPERINTENDENT OF THE BIA, FLATHEAD AGENCY, Ernest Moran, in their capacities; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Michael Pablo, Chairman, Sonny Morigeau, Secretary Treasurer, Joseph Felsman, Louis Adams, Hank Baylor, Tony Incashola, John Lozeau, Lloyd Irvine, Patrick Lefthand, Laurence Kenmille; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Rhonda R. Swaney; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. Lloyd Jackson; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Joseph Schneider, Gem Mercer, Al Hewankorn, Donald Lucas, Thurman Trosper, and Henry Normandeau,

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On Petition For Writ Of Certioari To The United States Court Of Appeals For The Ninth Circuit

## BRIEF FOR TRIBAL RESPONDENTS IN OPPOSITION

## OPINION BELOW

The unreported District Court decision dismissing this action is printed in Petitioner's Appendix at A-1 through A-15. Petitioner filed a notice of appeal to the Ninth Circuit Court of Appeals on March 3, 1993. Tribal Appellees filed a motion for summary affirmance to the Ninth Circuit on April 30, 1993. On May 3, 1993, Tribal Respondents received the petition for Writ of Certiorari. Petitioners filed a motion to stay the Ninth Circuit appeal on May 7, 1993. The Ninth Circuit denied Petitioner's motion to stay, as well as the Tribal motion for affirmance, by Order dated May 17, 1993. (Appendix p. 1, hereafter "App.")

## STATEMENT OF THE CASE

This case involves the extraordinary efforts of Petitioners (collectively referred to as "JBC") to circumvent established appellate practice. They challenge the validity of the exercise by the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation (hereafter "Tribes") of civil jurisdiction regulating an aspect of the Reservation environment as that law effects the activities of non-Indians. The Tribal law in question is the Aquatic Lands Conservation Ordinance ("ALCO"), App. 2-13, a civil regulatory ordinance "designed to effectuate the Tribal and federal goals of protecting the quality of Reservation aquatic habitat" upon which the Tribes' treaty-reserved fish and wildlife resources depend. (Petitioner's Appendix A-2; App. 14 (Treaty of Hellgate, July 16, 1855, 12 Stat. 975, Article III.) *See also, Confederated Salish and*

*Kootenai Tribes v. Namen*, 665 F.2d 951, 964-965 (9th Cir. 1982), *cert. denied*, 486 U.S. 1007 (1988) ("*Namen*"); *Joint Board of Control v. United States and Confederated Salish and Kootenai Tribes*, 832 F.2d 1127 (9th Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988).[1]

ALCO establishes administrative permitting processes for persons who wish to engage in activities that have the potential to impact adversely Reservation aquatic lands. Proposed projects are reviewed by an interdisciplinary team of professionals in fisheries, wildlife, hydrology, engineering, and other appropriate disciplines. Only after that review is conducted can the determination be made by the SPB whether ALCO applies to a proposed undertaking, and if so, whether to approve, approve with modification, or deny a project. Since implementation in 1987, hundreds of private, state, federal and Tribal undertakings have been processed under ALCO.

Of note, ALCO establishes Tribal administrative and judicial review process for all persons who either

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[1] After the Secretary of Interior approved ALCO in accordance with the Tribes' Constitution, the Tribes solicited region-wide public comment and held a public hearing on proposed implementing regulations, as required under the Tribal Administrative Procedures Ordinance, another Secretarily-approved Tribal law. (Petitioner's Appendix A-2). ALCO is administered by the Shoreline Protection Board ("SPB") recognized in *Namen, supra*, as possessing civil jurisdiction over Indians and non-Indians on the Flathead Indian Reservation. In keeping with the Tribes' practice, the SPB, a Tribal governmental agency, is comprised of Indians and non-Indians, including a state municipal court judge.

allegedly violate ALCO or feel aggrieved by a decision of the SPB. (App. 10-11). JBC ignored completely the Tribal processes.

## SUMMARY OF ARGUMENT

The JBC attempts to evade the rule of exhaustion of Tribal remedies enunciated in *National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. 845 (1985) ("*National Farmers*") and perfected in *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987) ("*Iowa Mutual*").[2] These cases set a rule that "civil jurisdiction over such activities *presumptively* lies in the tribal courts unless affirmatively limited by specific treaty provisions or federal statutes." *Iowa Mutual* at 18 (emphasis added). Instead, JBC chose to circumvent the exhaustion rule by filing for declaratory relief in federal district court, claiming Tribal jurisdiction to be "patently unconstitutional and violative of the limits of tribal jurisdiction established by this Court's decisions." (Petition, p. 11). The appropriate Tribal administrative and judicial forums were, therefore, deprived of the opportunity to interpret and apply Tribal law to the facts in this case. Providing a Tribal court the "full opportunity to determine its own jurisdiction" is one of the central reasons this Court has directed that exhaustion occur prior to attempting federal

[2] The rule of law from this Court, and as applied by the Ninth Circuit, addresses *exhaustion* of Tribal remedies. Accordingly, the JBC misleads when it suggests that this is an abstention case.

court review. *Iowa Mutual* at 16, 18; *National Farmers* at 857.[3]

The Tribes and the United States moved for dismissal under Rule 12b(6) of the Federal Rules of Civil Procedure for failure to exhaust Tribal remedies, as well as on issues of ripeness, standing, capacity to sue, and sovereign immunity. The district court granted the motion and issued a well-reasoned opinion applying this Court's exhaustion rule.[4] JBC filed a notice of appeal to the Ninth Circuit Court of Appeals. However, rather than perfect that appeal and enable the Ninth Circuit to review the

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[3] In *National Farmers*, petitioners sought to defeat Tribal exhaustion by asserting that 28 U.S.C. § 1331 afforded a basis for federal jurisdiction independent of the exhaustion requirement. In *Iowa Mutual*, the same argument was based on 28 U.S.C. § 1332. In each case this Court refused to accept that end run, reasoning that

> Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a "full opportunity to determine its own jurisdiction." (quoting *National Farmers*)

Iowa Mutual, p. 16.
The JBC argues that 28 U.S.C. § 2201 provides an independent Congressional exception to exhaustion (Petition, p. 23). That argument fails under the reasoning quoted above.

[4] The Ninth Circuit has repeatedly applied the rule and exceptions in *National Farmers* and *Iowa Mutual* and is the proper forum to resolve this case under normal appellate practice. *See, Burlington Northern Railroad v. Crow Tribal Council*, 924 F.2d 899 (9th Cir. 1991); *Crawford v. Genuine Parts*, 947 F.2d 1405 (9th Cir. 1991); *Stock West v. Taylor*, 942 F.2d 655 (9th Cir. 1991) aff'd in part and vacated in part 964 F.2d 912 (9th Cir. 1991); *FMC v. Shoshone-Bannock Tribe*, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1404 (1991).

district court decision and consider other grounds for dismissal, if necessary, JBC has taken this extreme approach of attempting to circumvent the Ninth Circuit as well as the Tribal forums.

JBC would have this Court believe that this case satisfies the provisions of Supreme Court Rule 11, and does so with a citation to the progeny of *Brown v. Board of Education*, 347 U.S. 403 (1954). (Petition, p. 14). The effort to elevate their complaint to the level of "imperative public importance" found in *Brown* is fatuous and unavailing.

The District Court decision comports with the United States Constitution and decisions of this Court. JBC's efforts to elevate their allegations of impaired Constitutional rights to the "imperative public importance" required under Rule 11 pales in comparison to the overwhelming federal governmental policy to support Tribal self-government and Tribal self-determination that form the basis for exhaustion in *National Farmers* and *Iowa Mutual*. This case does not satisfy the Rule 11 requirement of such importance as to mandate immediate settlement in this Court.

## ARGUMENT

### THE DECISION OF THE DISTRICT COURT IS CORRECT AND ADDRESSES NO ISSUE OF IMPERATIVE PUBLIC IMPORTANCE SUFFICIENT TO REQUIRE IMMEDIATE SETTLEMENT IN THIS COURT

#### 1. This Case Does Not Satisfy The Requirements of Rule 11.

The JBC assert that ALCO is "patently unconstitutional and violative of the limits of tribal jurisdiction established by this Court's decisions." (Petition, p. 11). They assert that this conclusory remark satisfies the requirements of Rule 11. Rule 11 provides an extraordinary avenue to bypass established appellate practice in exceptional circumstances. No challenge to Tribal jurisdiction has satisfied the requirements of Rule 11. The Rule is used sparingly and only when issues of national significance mandate an immediate, prejudgment writ. *See, Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (President Truman ordered federal takeover of the Nation's steel mills to avoid jeopardizing the national defense); *United States v. United Mine Workers*, 330 U.S. 258 (1947) (the United States sued to block a strike that effectively halted bituminous coal production nationwide); *Brown v. Board of Education*, 344 U.S. 1, 141, 891 (1952); 347 U.S. 482 (1954) (nationwide desegregation of public schools); *United States v. Nixon*, 418 U.S. 683 (1974) (a claim of Presidential privilege as a defense to a court order to divulge the Watergate tapes).

The *Nixon* opinion is demonstrative of the high threshold necessary to satisfy Rule 11. A Rule 11 petitioner must demonstrate that its claim falls within the

"limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." *Nixon* at 691 (quoting *United States v. Ryan*, 402 U.S. 530, 533 (1971)). There is, of course, no such immediacy or exigency here. There is no national defense issue at stake. An entire industry has not gone on strike. A President is not threatened with impeachment. Rather, several Reservation farmers simply do not like Tribal jurisdiction over "reservation affairs" (as that term is used in *Iowa Mutual* at 15, and *Stock West v. Taylor, supra* at 661) and do not want to follow the rule of exhaustion in *National Farmers* and *Iowa Mutual*.

In a deceptive string cite, devoid of legal analysis, the JBC attempts to cloak its petition in the progeny of *Brown v. Board of Education, supra*. The effort fails for many reasons, including, (1) the fact that in *Brown* the actions of state government allowing racial segregation of public facilities were challenged under the Fourteenth Amendment, (2) *Brown* was the focal point of a large number of related challenges to a suspect classification based upon race from throughout the Nation then pending before the Court, (3) reams of findings, studies and analysis of the challenged actions were available to the Court, and (4) the Court's finding that "education is perhaps the most important function of state and local governments" (344 U.S. at 493) clearly recognized the "imperative public

importance" of that issue to the nation.[5] No such imperative exists. Established trial and appellate practice will allow full review of the claims.

### 2. Tribal Jurisdiction Is Not Patently Violative Of Any Portion Of The Constitution.

As this Court has noted, "Indian Tribes occupy a unique status under our law." *National Farmers* at 851. For example, the Bill of Rights does not apply to the actions of tribal government, though the analogous protections contained in the Indian Civil Rights Act (25 U.S.C. 1301 *et seq.*) do apply. *Santa Clara Pueblo v. Martinez*, 436 U.S. 349 (1978). It is JBC's refusal to accept this fact of life that gives rise to their allegations of Constitutional infirmity here. They allege that ALCO deprives them of a Constitutional right to full and equal participation in tribal government and of civil rights and liberties, as well as the right to republican form of government.

Tribal civil jurisdiction over non-Indians is not per se a violation of these rights. *United States v. Mazurie*, 419 U.S. 544 (1975); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana v. United States*, 450 U.S. 544 (1981); *Namen*, at 964 n.31. Furthermore, claims founded upon the guarantee of a republican form of government (which applies to states, not tribes), present

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[5] JBC also attempts to invoke Rule 11 at footnote 14 on page 14 of the Petition, with a similar string cite to cases interpreting challenges to Acts of Congress. The JBC petition challenges this Court's exhaustion rule and Tribal law, not an Act of Congress.

no justiciable question. *Baker v. Carr,* 369 U.S. 186, 224 (1962).

### 3. Because The JBC Has Prosecuted The Case In Such A Manner As To Preclude Any Forum From Making Findings Of Fact Or Conclusions Of Law, It Is Not Possible To Ascertain The Jurisdictional Limits Of ALCO.

Tribal forums should be afforded "the first opportunity to evaluate the factual and legal basis for the challenge" to their jurisdiction, (*Iowa Mutual* at 16) for "Tribal Courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development." (*Iowa Mutual* at 14-15). Furthermore, "tribal courts are best qualified to interpret and apply tribal law." *Id.* at 16.[6]

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[6] To be sure, this Court has structured three exceptions to the requirement that the JBC must exhaust Tribal remedies prior to seeking federal court review. They may be invoked only when the exercise of Tribal jurisdiction is:

> motivated by a desire to harass or is conducted in bad faith, . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

*National Farmers,* p. 856 note 21.

JBC did not raise the first exception. It materially misrepresented the second exception, as noted by the District Court (Petitioner's Appendix A-12), yet still failed to satisfy it. Furthermore, JBC asserted unsubstantiated allegations of bias against Tribal administrative and judicial institutions and individuals in an unsuccessful effort to invoke the third exception; an act condemned by this Court when it "rejected similar

The Tribal law at issue provides protection to the habitat upon which treaty-reserved fish and wildlife resources depend (*Namen, supra,* at 964; *Joint Board of Control v. United States and Confederated Salish and Kootenai Tribes, supra*), protects the health and welfare of the Reservation population (*United States v. Montana,* 450 U.S. 544, 565-566 (1981)), and upholds the political integrity of the Tribal government (*Id.*). The jointly held Tribal and federal interests that control this matter are the federal policy of upholding and supporting Tribal self-governance and Tribal self-determination, as well as, the right of the Tribes to make their own laws for reservation affairs. *Williams v. Lee,* 358 U.S. 217, 220 (1959). The JBC interest lies in its perception that any exercise of Tribal civil jurisdiction over them is unlawful.

The JBC challenge has deprived the SPB and the trial and appellate Courts of the Confederated Salish and Kootenai Tribes of the opportunity to rule on the scope of ALCO. As this Court has stated:

> the existence and extent of a tribal court's jurisdiction will require a *careful* examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a *detailed* study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

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attacks on Tribal Court jurisdiction in the past." (*Iowa Mutual,* p. 19.) The District Court also condemned the JBC for this feeble effort to invoke the third exception. (Petitioner's Appendix A-13).

> We believe that examination should be conducted in the first instance in the Tribal Court itself.

*National Farmers*, pp. 855-856 (footnote omitted, emphasis added).

JBC asserts that as a matter of established Supreme Court authority, there is a per se rule that ALCO is unlawful, therefore exhaustion is inapplicable. They rely heavily upon the rulings in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), *United States v. Wheeler*, 435 U.S. 313 (1978), and *Duro v. Reina*, 495 U.S. 676 (1990), asserting that those decisions "cannot be distinguished on any principled basis. They control the issue and clearly state that in the factual situation presented here, the Tribal government has no jurisdiction."[7] Petition, pp. 20-21.

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[7] As noted above, there have been *no* administrative or judicial findings of fact. The JBC asserts many unproven and contested facts in its petition. For example, in an effort to bring into play the concepts discussed in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), the JBC asserts that the lands at issue are in an "open reservation" (Petition, p. i), that the lands at issue are in "completely agricultural areas of the reservation" (Petition, pp. 5-6), that 400,000 or more individuals nationwide are similarly deprived of Constitutional rights and "all other civil liberties" by the existence of ALCO on the Flathead Indian Reservation (Petition, p. 13), that the Tribes "punish land use by people who are not tribal members" (Petition, p. 3), numerous allegations regarding the Reservation population and land status, and that the Maughan project "will improve water quality" and related allegations (Petition, p. 8 note 7), as well as the broad spectrum of allegations in the Complaint.

*Oliphant, Wheeler,* and *Duro* address Tribal criminal jurisdiction over non-members or non-Indians. This Court has repeatedly distinguished criminal cases from challenges to Tribal civil jurisdiction on two principled reasons. First, should the Court "apply the *Oliphant* rule here, it is plain that any exhaustion requirement would be completely foreclosed because federal courts would *always* be the only forums for civil actions" involving Tribal and non-Indian disputes arising on the reservation. *National Farmers,* p. 854 (emphasis in original). The second principle distinction lies in the fact that Congress divested Tribes of aspects of criminal jurisdiction over non-Indians, but "there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation." *Id.* at 854 (footnote omitted). Accordingly, a Tribal assertion of civil authority "is not automatically foreclosed, as an extension of *Oliphant* would require." *Id.* at 855 (footnote omitted); *accord. Iowa Mutual,* 9, 15.

The JBC also relies upon several decisions of this Court dealing with Tribal civil jurisdiction to support its allegation that ALCO is "patently unlawful". The cases cited do not establish a per se rule. Rather, the JBC's central case, *Montana v. United States,* 450 U.S. 544 (1981) establishes a general rule that Tribes may have lost certain aspects of civil jurisdiction over non-Indians on fee status reservations lands, but also established several

clear exceptions to the general rule. *Id.* at 565-566.[8] The JBC petition is premature.

> Until petitioners have exhausted the remedies available to them in the Tribal Court system, . . . , it would be premature for a federal court to consider any relief. Whether the federal action should be dismissed, or merely held in abeyance pending the development of further Tribal Court proceedings, is a question that should be addressed in the first instance by a District Court.

*National Farmers,* at 857.

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[8] *Montana* predated the development of the Tribal exhaustion doctrine, which was, therefore, not an issue. Unlike the present case, the *Montana* Court was asked to decide the challenge to tribal jurisdiction over non-Indians on fee lands *after* an extensive trial that produced large volumes of evidence, findings of fact, and conclusions of law, followed by appellate proceedings before the Ninth Circuit.

The JBC also asserts the pending case of *State of South Dakota v. Bourland,* No. 91-2051 (U.S. Sup. Ct. argued March 2, 1993) is germane. They are wrong for two reasons. First, exhaustion of Tribal remedies was not an issue in *Bourland,* but is the central issue in this case. Second, the focus of *Bourland* is the effect of two Congressional acts, specifically limited to the Cheyenne River Sioux Reservation, on tribal regulatory authority over fish and game on Tribal lands taken by the federal government for flood control purposes. *South Dakota v. Bourland,* 949 F.2d 984 (8th Cir. 1991).

## CONCLUSION

For the foregoing reasons, the Confederated Salish and Kootenai Tribes respectfully request that the Petition for Writ of Certiorari to the United States Court of Appeals from the Ninth Circuit be denied.

Dated this 27th day of May, 1993.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| ROSS MIDDLEMIST, et al., Plaintiffs-Appellants, vs. THE SECRETARY OF THE INTERIOR, Bruce Babbitt, et al., Defendants-Appellees. | ) | No. 93-35315<br>DC# CV-91-155-CCL<br>Montana (Missoula)<br>ORDER<br>(Filed May 17, 1993) |

Before: WIGGINS and THOMPSON, Circuit Judges

Appelles' motion for summary affirmance is denied. *See United States v. Harris*, 846 F.2d 50 (9th Cir. 1988) (motion for summary affirmance should be made only after appellants' opening brief has been filed). Appellants' motion for stay of appellate proceedings is denied. The April 2, 1993 briefing schedule remains in effect.

(seal)

Ordinance No. 87-A

# AQUATIC LANDS CONSERVATION ORDINANCE

BE IT ENACTED BY THE COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES that:

## PART I

## SHORT TITLE, AUTHORITY

### Section 1. Short Title.

This Ordinance may be referred to as the Aquatic Lands Conservation Ordinance or "ALCO".

### Section 2. Authority.

This Ordinance is enacted pursuant to the Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Article VI, Section 1, Subsections (a), (l), (n), (t) and (u), approved by the Secretary of the Interior, October 28, 1935.

## PART II

## FINDINGS AND POLICY

### Section 1. Findings.

The Tribal Council finds that:

a. The self-governing capabilities, political integrity, health and welfare, and economic security of the Tribes will be protected and enhanced by Tribal governmental control, regulation and protection of aquatic lands which are critical for the perpetuation of Reservation fisheries

and wildlife, the preservation of Reservation water quality, and the maintenance of the health, safety and welfare of Tribal members and thereby of all persons residing on the Reservation.

b. The Treaty of Hellgate July 16, 1855 (12 Stat. 975) reserved to the Confederated Salish and Kootenai Tribes (hereinafter the "Tribes") the exclusive right to hunt and take fish within the exterior boundaries of the Flathead Reservation. The exclusive Treaty right to hunt and fish within the Reservation confers upon the Tribes the right, duty and responsibility to protect those Tribal interests.

c. Reservation population growth and increased unregulated utilization of aquatic lands are causing adverse impacts upon the quality of Reservation waters, fisheries and wildlife habitat, and therefore, there exists an immediate need to regulate and manage the use of aquatic lands to preserve and protect them.

Section 2. Policy.

It is the policy of the Tribal Council to prevent the degradation of Reservation waters and aquatic lands by regulating construction or installation of projects upon aquatic lands whenever such project may cause erosion, sedimentation, or other distrubances [sic] adversely affecting the quality of Reservation waters and aquatic lands.

## PART III

## GENERAL PROVISIONS

Section 1. Definitions.

For the purposes of this Ordinance the following definitions will apply:

a. "Adjacent" means bordering, contiguous or neighboring. Wetlands separated from other Reservation waters by man-made dikes or barriers, natural river berms and the like are "adjacent wetlands."

b. "Administrator" means the chief executive officer of the Shoreline Protection Office of the Confederated Salish and Kootenai Tribes.

c. "Aquatic Lands" means all land below the mean annual high water mark of a Reservation water body.

d. "Board" means the Shoreline Protection Board of the Confederated Salish and Kootenai Tribes.

e. "Discharge of dredged material" means any addition or placement of dredged materials into Reservation waters or on aquatic lands whether through direct placement, or by secondary means such as run-off, slumping or overflow from a disposal site.

f. "Discharge of fill material" means any addition or placement of fill materials into Reservation waters or onto aquatic lands.

g. "Dredged material" means material that is excavated, displaced, or removed from aquatic lands.

h. "Fill material" means any material used for the purpose of replacing Reservation waters with dry land or dredged material.

i. "Mean Annual High Water Mark" means that line on the shore of Reservation waters established by the

fluctuations of water and indicated by physical characteristics such as a clear, naturally occurring line impressed on the bank; shelving changes in the character of soil; paucity or lack of terrestrial vegetation; or the presence of water borne litter or debris.

j. "Office" means the Shoreline Protection Office of the Confederated Salish and Kootenai Tribes.

k. "Person" means any individual, partnership, association, corporation, and any other entity composed of individuals, and governmental entities.

l. "Project" means a physical alteration of aquatic lands, wetlands, or Reservation waters, not otherwise exempted by this Ordinance or implementing regulations, which has the potential to cause a material change in the condition of such lands or water in contravention of the policy of this Ordinance, and includes but is not limited to dredging, filling, unregulated access detrimental to aquatic lands, irrigation diversions and returns, drainage ditches and construction on aquatic lands, and furthermore, includes maintenance or repair involving any of the above activities.

m. "Reservation waters" means:

(1) all naturally occurring bodies of water within the exterior boundaries of the Reservation regardless of alternation by man, including but not limited to lakes, rivers, streams (including intermittent streams), mudflats, wetlands, sloughs, potholes and ponds from which fish and wildlife are or could be taken, but does not include wholely manmade water bodies.

(2) tributaries of waters identified in subpart (1) above;

(3) wetlands adjacent to Reservation waters.

n. "Responsible perosn" means any person who undertakes a project or causes a project to be undertaken on aquatic lands.

o. "Tribal Council" means the duly elected governing body of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana.

p. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include but are not limited to swamps, marshes, bogs and similar areas.

Section 2. Administration.

The Shoreline Protection Board of the Tribes, as created by Ordinance 64A (Revised), shall have the powers and duties associated with implementation of this Ordinance and any regulations promulgated hereunder. The rights, responsibilities and immunities of the Board, and the Tribal Council, as specified in Ordinance 64A (Revised) remain unchanged.

Section 3. Water Rights.

This Ordinance shall not be construed to diminish or divest any existing water uses established in accord with applicable law.

Section 4. Regulations.

The Tribal Council may promulgate regulations to implement the provisions of this Ordinance upon recommendation of the Board. Regulations shall be promulgated pursuant to procedures contained in the Tribal Administrative Procedures Ordinance.

## PART IV
## PERMITS

Section 1. Permit Required.

a. No work may commence on a project until the responsible person has been issued a permit for the project.

b. All work on a project shall be conducted pursuant to the terms and conditions of the project permit.

c. A permit shall be prominently displayed at the project site for the duration of construction activities and for two weeks thereafter.

Section 2. Permit Fees.

An application for a permit shall be accompanied by payment of a non-refundable fee to cover some costs associated with permit issuance and administration. The amount of the fee shall be fixed from time to time by regulation, shall take into account the scope of the proposal, and shall be reasonable.

Section 3. Application for Permit.

a. Any person who intends to undertake a project shall present a written application for the project to the Office.

b. The application shall be on a form provided by the Office and shall include, but is not limited to, a location map, a specific description of the proposed project, the purpose and need for the project, practical alternative methods of implementing the project, and a plan specifying the type, quantity and source of materials to be used, means of access to the project area, the length of time necessary to complete the project, and the name, address and telephone number of the responsible person.

Section 4. Evaluation of Proposed Projects.

a. The Administrator of the Office shall review an application for a permit for adequacy and for project technical feasibility, shall determine if the proposal constitutes a project, and may make such on-site investigations as are necessary to perform these duties.

b. If the Administrator determines that the proposal is not a project the Administrator shall so state in a written notice to the person responsible for the project within 14 days of receipt of the application.

c. If the Administrator determines that the proposal is for a project, the Administrator shall bring the application before the Board at the next regularly scheduled Board meeting or may call a special Board meeting if circumstances so require.

d. The Board shall review all applications. The Board shall either approve, approve with modifications or alternatives, or disapprove an application and shall state its decision in writing to the responsible person.

e. Upon approval or upon approval with modification or alternatives, the Administrator shall forward to the responsible person a permit which shall relate to the plan for the project approved by the Board, and which may include provisions for mitigation of adverse impacts associated with the project.

Section 5. Emergencies.

a. The provisions of this Section do not apply to emergency actions which are necessary to safeguard life or property during periods of immediate and substantial endangerment to life or property. The responsible person under this Section shall notify the Office in writing of the emergency undertaking within fifteen (15) days of commencement of such undertaking.

b. The Administrator shall make an on-site inspection of an action and cause a written report of such observations to be filed in with the Office and a copy shall be sent to the responsible person. The report shall include:

(1) a finding as to whether or not an emergency situation existed at the time the action was taken;

(2) a finding as to whether or not the action constitutes a project; and

(3) if the findings required in subparagraphs (1) and (2) above are affirmative, and a permanent solution is feasible, recommend in writing that the responsible person put the solution into effect within a specified reasonable amount of time pursuant to a duly issued permit. Failure of the responsible person to put the solution into effect is not a violation of this Section unless a substantially similar action arises from such failure to act.

Section 6. Modification or Revocation of Permit.

The Board may, upon a finding of non-compliance or upon a finding of necessity, either modify or revoke a permit after the responsible person has been afforded notice and an opportunity to be heard.

## PART VI

## ENFORCEMENT

Section 1. Inspection.

The Administrator or his duly authorized ageny [sic] may inspect any project for the purpose of determining compliance with this Ordinance, its implementing regulations, or permit terms and conditions.

Section 2. Projects in Non-compliance.

a. Except for emergency actions, a project engaged in by any person without a valid permit or in non-compliance with the terms of a valid permit shall be subject to proceedings brought by the Administrator for immediate abatement of a public nuisance.

b. Upon a finding that a non-complying project constitutes a public nuisance, the Tribal Court may penalize the responsible person in an amount not less than twenty five (25) dollars or more than five hundred (500) dollars for each day that the responsible person continues to engage in or maintains a non-conforming project at, in, or on aquatic lands.

c. In addition to any financial penalty imposed, the responsible person may be ordered by the Court to restore at his own expense the damaged lands and waters within such time as the Court may deem reasonable.

## PART VI [sic]

## REVIEW, SEVERABILITY, EFFECTIVE DATE

Section 1. Administrative Appeal of Board Action.

A person aggrieved by a final action of the Administrator or the Board may seek review of such action pursuant to procedures contained in the Tribal Administrative Procedures Ordinance, Ordinance 86A. For purposes of administrative review, a decision of the Board shall constitute final agency action, appealable to an administrative law judge.

Section 2. Judicial Review.

a. The Tribal Court of the Confederated Salish and Kootenai Tribe shall have jurisdiction to hear and decide all causes arising under this Ordinance and implementing regulations and to hear appeals from agency actions upon exhaustion of administrative remedies.

b. The decision of the Tribal Court shall be final.

Section 3. Severability.

If any provision of this Ordinance or the applicability thereof is held invalid by any court of competent jurisdiction, the remainder of this Ordinance shall not be affected thereby.

Section 4. Effective Date.

This Ordinance shall become effective, pursuant to the terms of Article VI, Section 2 of the Tribes' Constitution, upon promulgation of implementing regulations by the Tribes.

CERTIFICATION

The foregoing ordinance was adopted by the Tribal Council on December 13, 1985, with a vote of 9 for, 0 opposed, and 0 not voting, pursuant to the authority vested in it by Article VI, Sections 1(a), (1), (n), (t) and (u) of the Tribes' Constitution and Bylaws; said Constitution adopted and approved under Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended.

/s/ James J. Steele
Vice-Chairman,
Tribal Council

ATTEST:

/s/ Illegible
Executive Secretary

APPROVAL:

_____
Title: _____
Bureau of Indian Affairs

Date: _____

APRPOVED:
/s/ Donovan R. Boldt
SUPERINTENDENT

Received Office of
Superintendent

**Treaty of Hellgate**
July 16, 1855 (12 Stat. 975)

Article 3.

. . . The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.